54

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

KEITH L. MILLER,

Petitioner,

v.

GENEVA FINNIN, GUARDIAN & ANOTHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
MASSACHUSETTS SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a state court appellate decision, reversing a jury verdict and judgment in favor of the Petitioner, which was based on grounds never briefed, considered or argued by either party below, or on appeal, and which, when applied, effectively abrogates a controlling state statute, violates the Petitioner's due process rights under the United States Constitution.

II. Whether the Petitioner's due process Rights were also violated when two state appellate courts, upon being apprised of a controlling state statute, which was never previously considered, briefed or argued, refused to grant a hearing on his requests for further appellate review or to provide any statement or justification why the statute should not apply.

III. Whether the refusal of a state's appellate courts to apply a controlling state statute without considering or declaring the statute unconstitutional, and in violation of a separation of powers provision of the state constitution, deprived the Petitioner of his due process rights under the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Keith L. Miller, an individual;

Geneva Finn, an individual;

Kou-Chen Kao, an individual; and

East-West Limited Partnership, a limited partnership

LIMITED PARTNERSHIP DISCLOSURE

East-West Limited Partnership is a closely held limited partnership.

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STATEMENT OF JURISDICTION

The Supreme Judicial Court for the Commonwealth of Massachusetts entered its decision denying further appellate review on February 1, 2007. Petitioner, Keith L. Miller, seeks review of an Appeals Court Decision, reversing a jury verdict and judgment in his favor, on a writ of certiorari under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

This proceeding raises questions about basic procedural due process. The issues are not minor procedural matters, but are at the core of a litigant's ability to pursue a cause of action, to be afforded notice of the issues, which the Courts intend to address, and to be heard on those issues at a meaningful time and in a meaningful manner. *See City of Los Angeles v. David*, 123 S.Ct. 1895, 1896-1897 (2003).

In this case, the Petitioner has been denied his basic due process rights by the appellate courts of his state, those courts, which exist in theory for the very purpose of protecting him from violations of due process under the constitutions of his state and the United States. As a consequence of the denial of his due process rights, he has been unduly deprived of his property. Granting a writ of certiorari will address, preserve and restore fundamental notions of due process, as discussed hereafter.

On or about June 19, 2000, the Petitioner and Plaintiff below, Keith L. Miller ("Miller") submitted a written Offer to Purchase ("OTP") an apartment building located at 175 Northampton Street, Boston, Massachusetts ("Property"). The offer was made to the "Owner of Record" of the Property, and was submitted to a real estate broker who had been retained by Defendant, Geneva Finnin ("Finnin").

Two days later, on or about June 21, 2000, Finnin accepted the offer by executing the OTP and delivering it to the Plaintiff through her attorney. Finnin signed the OTP, individually, and not in any representative capacity. Miller also forwarded a check to Finnin's attorney to bind the offer, which was deposited in the attorney's client escrow account. At this point, as decided by the jury, the OTP was a contract, binding on *both* parties to the agreement.

Following execution of the binding contract by both parties, in a telephone conversation with Finnin's attorney, Miller learned for the first time that, although she had signed the OTP, Finnin was not the Owner, but the court appointed legal guardian of her incompetent grandmother, Geneva Harden ("Harden"), who owned the Property. Finnin's attorney advised Miller that he would therefore be submitting an

application to the Probate Court for a license to sell the Property.

Subsequently, in a letter dated July 25, 2000, Finnin notified her attorney that she did not intend to proceed with the sale to Miller, and that she was terminating her attorney's services. The jury heard this evidence, and Finnin's alleged justifications for not going forward with the sale to Miller, and determined that her refusal to proceed was a breach of a binding obligation to sell the Property to Miller under the OTP.

On December 18, 2000, Harden died, leaving a Will, which named Finnin as both the executrix of Harden's estate, and the named beneficiary of the Property at 175 Northampton Street. Finnin was subsequently appointed the executrix of Harden's estate.

On July 17, 2001, over a year after executing the OTP and seven months after she became the owner of the property, Finnn sold the Property to Defendant, Kou-Chen Kao ("Kao") for a purchase price greater than that set forth in the OTP. Finnin neither sought, nor obtained a license to sell the Property from the Probate Court in order to convey to Kao, because by that time she was the executrix and beneficial owner of the property.

At trial, the jury found that Finnin had a binding contract with Miller and breached it. The trial judge subsequently granted specific performance of the contract and ordered Kao to re-convey the Property to Finnin, and Finnin, individually, to convey the Property to Miller. Finnin subsequently did convey the Property back to Miller and he holds title to it at this time.

Defendants appealed and presented five closely related "Issues For Review", all of which concerned whether the contract was legally enforceable against a guardian, in the absence of a license to sell from the Probate Court. Not one of the issues addressed whether Defendant could be individually liable, as had been established in the trial court by the judge and the jury.

The Appeals Court reversed the jury verdict and judgment for specific performance in favor of Miller, and ruled, as a matter of law, that Finnin could not be found individually liable under the contract.

In its decision, the Appeals Court specifically concluded that:

> The evidence does not permit a finding other than that the Defendant executed the offer to purchase in her capacity as Harden's Guardian. (A. 10A)

However, the Appeals Court specifically acknowledged, and it is undisputed, that Finnin neither revealed her representative capacity, nor identified the estate of her grandmother in the OTP. (A. 5a)

The Massachusetts legislature has enacted a statute, M.G.L. c. 201, § 37, which specifically mandates the liability of guardians under contracts, in just such a case. The statute provides in pertinent part that a guardian who signs a contract without identifying *in the contract* his/her representative capacity, or the estate he/she represents, is individually liable.

The relevant provision of the statute reads:

> Individual liability of the conservator or guardian *shall* be determined as follows:
>
> > a) Unless otherwise provided in the contract, a conservator or guardian *shall not be individually liable on a contract* properly entered into in his fiduciary capacity in the course and administration of the estate *unless he failed to reveal his representative capacity and identify the estate in the contract.* [Emphasis supplied.] (A. 15a)

Thus, the ruling and the decision of the Appeals Court had the effect of abrogating a state statute, which directly controls this case, without notice being afforded that it would address the issue or ever mentioning or considering the specific statute. Given that the issue was never briefed, considered or argued below, Miller had no notice or opportunity offer the governing state statute for consideration by the reviewing court or offer his arguments with respect to the same.

Perhaps more significantly for Due Process purposes, following receipt of the Appeals Court Decision, when Miller specifically put the statute before the Appeals Court, in a Request for Rehearing, and also before the Massachusetts Supreme Judicial Court, in a Request for Further Appellate Review, both denied his Requests without any hearing, or any discussion of why the statute would not apply in this case (See Appendix B and C).

Thus, the Massachusetts state courts have effectively abrogated an act of the legislature, thereby depriving Miller of his real property, without any notice or any opportunity to be heard on the issue. This was a denial of Miller's due process rights under the United States Constitution.

Furthermore, Massachusetts, unlike many other states, has a provision in its Constitution, *Constitution of the Commonwealth of Massachusetts, Declaration of Rights, Article 30*, which mandates Separation of Powers between the different branches of government. The Massachusetts Courts have long recognized a prohibition on the judiciary from interpreting statutes to avoid perceived injustice or hardship, if the language of the statute is clear and unambiguous. *Rosenbloom v. Kokosfsky*, 373 Mass. 778, 781 (1977).

To the extent that the state appellate courts in this case (1) directly or indirectly intended to supercede the authority of the legislature by refusing to apply a controlling statute, and (2) intended to do so without violating the separation of powers provision of the Massachusetts Constitution, it was incumbent on those courts to provide notice and an opportunity to be heard, under the due process standards of Article IV of the United States Constitution.

ARGUMENT

I. The Appeals Court Reversed the Jury Verdict and Judgment for Miller on Grounds Never Previously Briefed, Considered or Argued by the Parties.

The premise of Defendants' argument on appeal was that Finnin had executed the OTP as a guardian

and her obligation was therefore subject to the condition subsequent that a Probate Court approve the sale. Absent such approval, there was no enforceable obligation. By simply refusing to act, Finnin argued, the condition subsequent was never satisfied and it was extinguished upon Harden's death.

Miller addressed this argument, acknowledged that Finnin, as guardian, might not be legally bound, but maintained that the jury and the judge had nonetheless determined that she was individually liable under the contract, given the unambiguous terms of the OTP, and the fact that she signed individually, and not as guardian.

The Appeals Court, however, declared that she could not be liable, as guardian or *individually*, as a matter of law, stating:

> That the defendant did not *expressly limit her signature* does not, in these circumstances, strike us as sufficient to overcome all of the contrary evidence regarding the parties' understanding.[1] [emphasis supplied]. (A. 9a.)

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[1] This evidence to which the Appeals Court refers, concerns only events, which took place in the time period *after* the OTP was executed and the parties were legally bound. The Appeals Court never states that Miller had actual or constructive knowledge that Finnin was acting as guardian on or before the execution of the OTP. In fact, in Footnote 5, the Court states:

> The plaintiff testified that "at the time that I made the offer I put, owner of record, at the top because I didn't know what the legal relationship was between Jean Finnin and her grandmother with respect to the property. I didn't know if it had been transferred to Jeannie, I didn't know if she was the legal guardian, I had no knowledge." (A. 5a)

The Appeals Court Decision ignores the fact that the Massachusetts Legislature has spoken on the individual liability of a guardian who fails to "*expressly limit her signature*" in a contract she signs. Massachusetts General Laws chapter 201, section 37 mandates that a guardian who enters into a contract with another on behalf of the estate shall not be individually liable unless he failed to reveal his representative capacity and identify the estate in the contract.

The relevant portion of the statute reads:

> Individual liability of the conservator or guardian *shall be determined* as follows:
>
> > (a) Unless otherwise provided in the contract, a conservator or guardian *shall not be individually liable on a contract* properly entered into in his fiduciary capacity in the course of administration of the estate *unless he failed to reveal his representative capacity and identify the estate in the contract* [emphasis supplied]. (A. 15a)

Here, because Finnin failed to limit her signature by revealing either her representative capacity or the estate in the OTP, she is individually liable under the statute.

Miller maintains that the Appeals Court Decision, which ignores and contravenes an act of the legislature, in the absence of any consideration of the statute, or any prior notice or opportunity to be heard on the issue, denied him his right to due process

under the Fourteenth Amendment to the United States Constitution.

Furthermore, following receipt of the Appeals Court Decision, Miller specifically filed a Request for Rehearing before the Appeals Court, and a Request for Further Appellate Review to the Massachusetts Supreme Judicial Court, and in so doing, put Massachusetts General Laws, ch. 201, § 37 before both. The Appeals Court, and the Supreme Judicial Court denied his Requests without hearing, and therefore failed to describe or justify in any way why the statute would not apply in this case.

To this day, no state court has provided any indication why a controlling act of the legislature does not dictate the outcome of this case. This violates Miller's fundamental right to due process under Amendment IX to the United States Constitution.

II. Due Process Clause Requires Notice and An Opportunity To Be Heard.

The Supreme Court has addressed and established a flexible approach in determining the application of the due process clause. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As a first step, for the due process clause to apply, an aggrieved party must be deprived of property. *Id.* Here, the state court decisions will deprive Miller of his ownership of valuable real property.

In order to pass constitutional muster, as an initial matter, "notice must be of such nature as reasonably to convey the required information." *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950). Where government action deprives an individual of property, three factors then guide the

analysis and determination whether due process has been afforded. These factors include (i) the private interest that will be affected, (ii) the risk of erroneous deprivation through the procedures used and the value of additional safeguards and (iii) the Government's interest, including additional burdens. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The notice, timing of the hearing and nature of the required hearing all depend on the appropriate accommodation of the competing interests. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435 (1982); *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

The precise issue brought forward by this Petition has not been addressed by the Supreme Court and is of vital interest not only to the Miller (who will be deprived permanently of his property interest), but also to other litigants who may face this issue in the future. *See generally, Vitek v. Jones*, 445 U.S. 480, 491 (1980) (minimum due process standards are a matter of federal law, not state procedural law).

III. Miller Was Not Provided With Notice or An Opportunity To Be Heard on The Issues Upon Which the Appeals Court reversed the Judgment and Jury Verdict in His Favor.

In this case the judge and jury found Finnin individually liable under the contract. Finnin's subsequent appeal presented issues pertaining exclusively to her liability as guardian. The Defendants never raised the issue of Finnin's individual liability, which Miller maintained was governed by the four corners of the unambiguous contract, which she signed.

In its decision, however, the Appeals Court boldly pronounced that Finnin could not be found individually liable as a matter of law, notwithstanding the fact that she had failed "to limit her signature" in the OTP.

It was this bold pronouncement, heard for the first time in its written decision, which invoked the controlling statute, Massachusetts General Laws, ch. 201, § 37. Miller had no prior notice that the court intended to address this issue or make such a pronouncement, and could not have foreseen that it would do so.

Admittedly, Petitioner was afforded notice of a hearing on his appeal, and a hearing took place. However, given the issues raised and addressed by the parties in briefs and at oral argument, there existed no real procedural safeguard that the court would make new law, abrogating a controlling statute, without even mentioning or considering the statutory provision.

The Appeals Court, by providing some prior notice to the parties of the actual issues it intended to decide, or by granting Miller a rehearing, after it had been apprised of the statute, would not have been unduly burdened and would have afforded the parties a real opportunity to present their arguments and objections. *See Dusenbery v. US*, 534 U.S. 161, 169 (2002). Likewise, the Massachusetts Supreme Judicial Court, by granting further appellate review, could have provided Miller with some semblance of due process. It elected not to do so.

Finally, the opportunity for some post deprivation hearing would also have reduced the risk of governmental error, and provided the state court with an opportunity to cure a potential error.

However, no such post deprivation hearing was ever afforded in this case. The flexible application of the due process clause, when applied to this case, and appropriately balanced in this context, mandates the reversal of the State Appeals Court decision.

IV. The Separation of Powers Provision of the Massachusetts Constitution Prohibits the Appellate Courts From Superceding an Act of the Legislature Absent some Constitutional Infirmity.

Article 30 of the Declaration of Rights of the Massachusetts Constitution mandates Separation of Powers between the different branches of government. The Massachusetts Supreme Judicial Court has often limited and prevented its lower courts from interpreting statutes to avoid perceived injustice or hardship, when the language of the statute is clear and unambiguous.[2]

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[2] "The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative, body. See art. 30 of the Massachusetts Declaration of Rights. In construing a legislative enactment, it is our duty to ascertain and implement the intent of the Legislature. See *Baker Transp., Inc.* v. *State Tax Comm'n*, 371 Mass. 872, 875-877 (1977). If the language of a provision is unclear, a court may look to outside sources for assistance in determining the correct construction. *Massachusetts Mut. Life Ins. Co.* v. *Commissioner of Corps. & Taxation*, 363 Mass. 685, 690 (1973). Where, however, no such ambiguity exists, these outside aides are unavailable. *Id.*; *Rice* v. *Rice*, 372 Mass. 398, 400-401 (1977); *Chouinard, petitioner*, 358 Mass. 780, 782 (1971), and the enactment must be interpreted according to the "usual and natural meaning" of its language. *Commonwealth* v. *Gove*, 366 Mass. 351, 354 (1974). We cannot interpret a statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires a different construction. *Milton* v. *Metropolitan Dist. Comm'n*, 342 Mass. 222, 227 (1961)". *Rosenbloom* v. *Kokosfsky*, 373 Mass. 778, 781 (1977).

In this case, a clear and unambiguous act of the Massachusetts Legislature dictates Finnin's liability under the OTP. The Appeals Court did not find otherwise. The Appeals Court never questioned the jury verdict and judgment that the OTP was in general a binding agreement under Massachusetts law. *See McCarthy v. Tobin*, 429 Mass. 84, 88 (1999). It also never questioned the fact that Finnin had failed to disclose either her status as guardian or the identity of the estate in the OTP.

Thus, it is the state appellate courts in this case, which have transgressed and superceded their authority under the separation of powers provision of the state constitution. In so doing, they have deprived Miller of his property without due process. There is no higher *state* authority, which can or will protect his rights under the Massachusetts and the United States Constitution, and therefore he looks to this Court to provide him with this protection.

CONCLUSION

The Petitioner, Miller, in this case was not afforded notice of the issues upon which the Appeals Court elected to reverse the jury verdict and judgment in his favor. The hearing, which took place, did not address the issues. The Appeals Court would not have been unduly burdened by granting a Rehearing, as requested, after being apprised of the controlling statute. A hearing before either appellate court would have plainly safeguarded against a decision, which abrogates a state statute without ever considering it, and violates the separation of powers provision of the Massachusetts Constitution. For all of these reasons, Petitioner's basic due process rights have been violated, and asks that this Court grant his Petition and further consider the issues.

Respectfully submitted,

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APPENDIX A

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

In the case no. 05-P-660

At Boston,

KEITH L. MILLER

vs.

GENEVA FINNIN, guardian, & another.

Pending in the Superior

Court for the County of Suffolk

Ordered, that the following entry be made in the docket:

Judgment reversed.
Judgment for the
defendants shall enter.

By the Court,

/s/ ,Clerk

Date September 29, 2006

NOTE:
The original of the within rescript
will issue in due course, pursuant
to M.R.A.P.23

APPEALS COURT

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

05-P-660

KEITH L. MILLER

vs.

GENEVA FINNIN, guardian,[1] & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Geneva Finnin, appointed guardian of her grandmother, Geneva Harden, executed a written offer to purchase whereby she agreed to sell certain real estate belonging to Harden to the plaintiff, Keith L. Miller, for $230,000. Subsequently, the defendant refused to execute a purchase and sale agreement with the plaintiff, and sold the property instead to the codefendant, Kou-Chen Kao, for $245,500. In an action in the Superior Court for specific performance and damages, the plaintiff obtained a special jury verdict that the defendant had breached a binding agreement. The judge then determined that specific performance was appropriate, ordered the codefendant to reconvey the real estate to the defendant, and ordered the defendant to convey the property to the plaintiff for the $230,000 price set forth in the offer to purchase.

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[1] Of Geneva Harden. The counts against Finnin individually and as executrix of the estate of Geneva Harden were dismissed.

[2] Kou-Chen Kao, individually and as general partner of East-West Limited Partnership.

Following an evidentiary hearing held without a jury, the judge also awarded the plaintiff damages of $14,580 for net income lost during the period that he was delayed in his acquisition of the property. Each party appealed, the plaintiff seeking increased damages (or a new trial thereon), the defendant and codefendant seeking reversal of the judgment awarding specific performance and damages. We conclude that, in the absence of a license to sell the real estate, the defendant's contract, if entered into in her capacity as guardian, was unenforceable; and that the evidence did not support a finding that the defendant committed herself in her individual capacity. Accordingly, we reverse.[3]

1. Facts. The jury could permissibly find the following. In March, 2000, the defendant was appointed by the Probate and Family Court to be the guardian of her grandmother, Geneva Harden. By this time, Harden had executed a will which, in relevant part, named the defendant executrix and bequeathed to her certain multi-unit residential property at 175 Northampton Street, Boston.[4] There was no evidence that the defendant was aware of the contents of Harden's will. The defendant decided to sell the property, a power which, as guardian, she was entitled to exercise if necessary in order to provide for the ward, but only pursuant to a license granted by the court that had appointed her. See G. L. c. 201, § 37; G. L. c. 202, §§ 5-8, 10-11.

On or about June 21, 2000, the defendant accepted the plaintiff's offer to purchase the real estate for $230,000. The parties executed an "offer to purchase," see McCarthy v. Tobin, 429 Mass. 84, 85

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[3] In light of our decision, it is unnecessary to address the appropriateness of the order for specific performance or the award of damages.

[4] There is no dispute regarding the validity of Harden's will.

(1999), containing, among other provisions, identification of the property; the purchase price; mortgage and inspection contingency clauses; and a closing date of August 15, 2000. The offer was addressed to "owner of record."[5] It contained no reference to the obtaining of a license to sell, and the defendant signed the offer without indicating that she was doing so in a fiduciary capacity. The offer called for execution of a purchase and sale agreement within thirty days.

On July 6, 2000, the defendant filed in the Probate and Family Court an application for a license authorizing sale of the real estate to the plaintiff for $230,000. However, the defendant's attorney (Mr. Lewis) never forwarded a proposed purchase and sale agreement to the plaintiff. Consequently, on July 20, 2000, the plaintiff's attorney prepared a draft purchase and sale agreement and forwarded it to Lewis. The draft agreement, which contained a provision that the sale was subject to issuance of a judicial license to sell, called for a closing on September 30, 2000.[6] Apparently dissatisfied with Lewis's representation, the defendant discharged him and refused to sign the purchase and sale agreement proffered by the plaintiff.

On August 8, 2000, the defendant, newly represented, filed another application for a license to sell the Northampton Street real estate to a different purchaser for a higher amount. The plaintiff opposed the application, and, on September 25, 2000, commenced this action in the Superior Court for

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[5] The plaintiff testified that "at the time that I made the offer I put, owner of record, at the top because I didn't know what the legal relationship was between Jean Finnin and her grandmother with respect to the property. I didn't know if it had been transferred to Jeannie, I didn't know if she was the legal guardian, I had no knowledge."

[6] The plaintiff testified that he proposed a closing date forty-five days later than that specified in the offer to purchase because of the delay in obtaining the license to sell.

specific enforcement of the agreement to convey the property to him and for damages. On October 3, 2000, a judge of the Probate and Family Court appointed a guardian ad litem to represent the ward, but took no action on either of the defendant's license applications. On December 18, 2000, Harden died. On July 17, 2001, the defendant, now executrix of Harden's estate, sold the Northampton Street property to the codefendant for $245,500.[7]

2. Discussion. The defendants do not challenge: the binding character of the offer to purchase under ordinary circumstances. See McCarthy v. Tobin, 429 Mass. at 86-88. The essence of their argument is that, absent the issuance of a license to sell the real estate (required by statute because the contemplated sale was by a guardian), the offer to purchase was unenforceable. We agree that, absent a license to sell, the guardian could not lawfully transfer the property while the ward lived and the guardianship continued. See Geoghegan v. Clay, 362 Mass. 117, 118 (1972) ("[a]n agreement by a conservator requires, as a condition precedent to its binding effect, a license to sell issued by the Probate Court"). See also Minnehan .v. Minnehan, 336 Mass. 668, 669-670 (1958) (license to sell could not issue after death of the ward). Because the license requirement is a product of a statute and is designed to protect the ward, it could not be waived by the guardian.

Nor did the defendant .do anything to obstruct issuance of a license in any way that might create an estoppel. That the defendant filed a second application for a license after receiving a higher offer for the property did not constitute unreasonable interference with issuance of a license to sell the property to the plaintiff. Indeed, the defendant, while she was a

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[7] No license to sell is required where the executrix has power to sell real estate under the terms of the will. See Onanian v. Leggat, 2 Mass. App. Ct. 623, 628 (1974).

fiduciary, had an obligation to obtain the highest available price for the ward's benefit. See Onanian v. Leggat, 2 Mass. App. Ct. 623, 625 (1974). See also Annot., Second & Higher Offer as Affecting Final Approval of Trustee's Sale, 1 A.L.R. 3d 629, 630 (1965) (Massachusetts adheres to view that "trustee making sale of trust property must repudiate his acceptance of an initial bid or offer upon receipt of a subsequent higher bid or offer"). Where a license to sell is necessary, Massachusetts law requires that the fiduciary report a higher offer if one is received prior to issuance of the license for which application was originally made. See Grennan v. Pierce, 229 Mass. 292, 294 (1918).[8]

In the present case, once the ward (Harden) died, the guardianship ceased. Thus, no license to sell either to the plaintiff or to the codefendant could issue. See Minnehan v. Minnehan, supra. Consequently, the plaintiff's offer to purchase became permanently unenforceable because a condition precedent, the issuance of a license to sell, could never be satisfied. Where the defendant entered into the agreement in her capacity as guardian, and a license had not issued by the time of the ward's death, the defendant was relieved of her commitment to convey the property.

The plaintiff counters by arguing that, while the defendant's obligation as a fiduciary might have lapsed, she remained liable on the written agreement in her individual capacity. It is true that trustees and executors may be held personally liable on contracts that they make with third parties unless they expressly disclaim personal liability. See Onanian v. Leggat, 2 Mass. App. Ct. at 625-626; 3A Scott &

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[8] Thus, the judge appears to have faulted the defendant unfairly by his statement that "but for . . . [the defendant's] change of mind based on a higher offer I find the license to sell would most likely have been issued."

Fratcher, Trusts § 262 (4th ed. .1988).[9] We have no reason to believe that the contracts of a guardian would be treated otherwise, although we acknowledge that there are differences between trustees and executors on the one hand and guardians on the other.[10] We proceed therefore to the question whether the defendant, notwithstanding the absence of an express disclaimer, can be held individually responsible on this particular contract, and we conclude that, on this record, she has no personal liability.

There was undisputed evidence that the defendant had an urgent need of funds with which to support her grandmother.[11] She applied to the Probate and Family Court twice for licenses to sell, efforts that would have been unnecessary were she not acting in her capacity as guardian. Despite his expressed uncertainty regarding the defendant's capacity, the plaintiff knew that she would apply for such a license, and even provided for such an application in his draft purchase and sale agreement. His objective was to acquire the building. He was certainly constructively aware, and appears to have been actually aware, that the defendant, while she was guardian, could not convey the property absent a license. Furthermore,

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[9] If the trustee or executor acted within her authority in entering the contract, she would presumably be entitled to reimbursement out of trust assets (assuming such assets are sufficient). The' other party to the contract may, however, look to the trustee or executor for performance, and, absent an agreement to the contrary, is not limited to recourse against the trust or estate. See Onanian v. Leggat, supra at 626-627.

[10] Trustees and executors have title to the property under their supervision as well as considerable independence with respect to the conveyance of it, whereas guardians do not have title and are under closer court supervision (especially with respect to real estate).

[11] The judge credited this, finding that the defendant "was acting out of desperation. She was extraordinarily concerned about the well-being of her grandmother and the ability to provide for her grandmother."

there being no evidence either that the defendant knew that she would acquire the property under the terms of Harden's will, or that the defendant knew that Harden's death was imminent, the jury could not reasonably infer that the parties contracted in anticipation that the defendant would soon become the owner, and was binding herself to sell the property when she in fact acquired title. See Forester v. O'Connell & Lee Mfg. Co., 328 Mass. 377, 380 (1952) ("[t]he plaintiffs knew that they were dealing with the trustees in a fiduciary capacity"). That the defendant did not expressly limit her signature does not, in these circumstances, strike us as sufficient to overcome all of the contrary evidence regarding the parties understanding.

The result is not inconsistent with Onanian v. Leggat, supra. There, the defendant, executor under a will that conferred on him the power to sell real estate, entered into a purchase and sale agreement to convey the subject property for $32,500 contingent upon issuance of a license to sell from the Probate Court. A license issued in due course. The defendant then learned of a higher offer for the property, reneged on the agreement, conducted an auction, and sold the property to the same purchaser, but at a price of $35,155. The purchaser sued for and recovered the difference. We concluded that, because the required license had issued, the defendant "had the power to sell [the property] at the minimum figure," and issuance of the license "satisfied the only condition precedent to which the defendant's contractual liability was subject." 2 Mass. App. Ct. at 629, 630. There no longer being any impediment to performance of the contract, the defendant was held personally liable for the loss incurred by the plaintiff as a result of the defendant's breach of the original agreement.

By contrast, in the present case no license issued, and the defendant was consequently without power to perform the contract. The case, in our view, is governed by Grennan v. Pierce, 229 Mass. 292

(1918), and Forester v. O'Connell & Lee Mfg. Co., 328 Mass. 377 (1952). In those cases, the fiduciary lacked the authority to sell because the precondition of court approval had not been fulfilled. In each instance, the court noted the absence of bad faith on the part of the defendant. "[The defendant] was in no way responsible for the action of the court. The record is at the opposite pole from showing any actual or constructive bad faith on the part of the trustee." Grennan v. Pierce, supra at 294. See Forester v. O'Connell & Lee Mfg. Co., supra at 379-380. Thus, where the fiduciary, through no fault of her own, is unable lawfully to effectuate the conveyance, it follows that she has no liability either as a fiduciary or individually. That is dispositive here. Contrast Onanian v. Leggat, supra. Indeed, the alternative is placement of the fiduciary in the nonsensical position where she is legally required to reject an earlier agreement and report a higher offer to the court, while thereby subjecting herself to personal liability to the original purchaser. We do not construe Massachusetts law to require such a result.

3. Conclusion. The evidence does not permit a finding other than that the defendant executed the offer to purchase in her capacity as Harden's guardian. If so, upon the death of the ward and the termination of the guardianship without the prior issuance of a license to sell, the agreement was unenforceable, and the defendant was free to sell the property to another.

Judgment reversed.

Judgment for the defendants shall enter.

By the Court (Armstrong, C.J., Cowin & Graham, JJ.),

/s/_____, Clerk

Entered: September 29, 2006

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square, Suite 1200
BOSTON, MASSACHUSETTS 02108-1705
(617) 725-8106

January 16, 2007

Steven K. Parnagian, Esquire
21 School Street
2nd Floor
Boston, MA 02108

RE: No. 2005-P-0660

KEITH L. MILLER
vs.
GENEVA FINNIN & others

NOTICE OF DOCKET ENTRY

Please take note that on January 12, 2007, the following entry was made on the docket of the above-referenced cases:

ORDER: Denial of petition for rehearing. (CJA-CW-GM, JJ.) *Notice/Image.

Very truly yours,

The Clerk's Office

Dated: January 16, 2007

To: Steven K. Parnagian, Esquire
Isaac H. Peres, Esquire
Donald E. McNamee, Esquire

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APPENDIX C

Supreme Judicial Court for
the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400,
Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Steven K. Parnagian, Esquire
21 School Street
2nd Floor
Boston, MA 02108

RE: Docket No. FAR-15781

KEITH L. MILLER

vs.

GENEVA FINNIN, GUARDIAN & another

Suffolk Superior Court No. SUCV2000-04288
A.C. No. 2005-P-0660

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 02/01/07, the above-captioned Application for Further Appellate Review was denied. (Cowin, J., recused.)

Susan Mellen, Clerk

Dated: February 1, 2007

To: Steven K. Parnagian, Esquire
Isaac H. Peres, Esquire
Donald E. McNamee, Esquire

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APPENDIX D

CHAPTER 201. GUARDIANS AND CONSERVATORS

GENERAL POWERS AND DUTIES OF GUARDIANS AND CONSERVATORS

Chapter 201: Section 37. Payment of debts; representation of ward in suits; liabilities

Section 37. A guardian or conservator shall pay all just debts which are due from his ward out of the personal property, if sufficient, and, if not, out of the real property, upon obtaining a license for the sale thereof as provided in chapter two hundred and two. He shall settle all accounts of his ward and demand, sue for and receive all debts due to him or, with the approval of the probate court, may compromise the same and give a discharge to the debtor. He shall appear for and represent his ward in all actions, suits and proceedings, unless another person is appointed therefor as guardian ad litem or next friend.

Individual liability of the conservator or guardian shall be determined as follows:

(a) Unless otherwise provided in the contract, a conservator or guardian shall not be individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he failed to reveal his representative capacity and identify the estate in the contract.

(b) A conservator or guardian shall be individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he was personally at fault.

(c) Claims based on contracts entered into by a conservator or guardian in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator or guardian in his fiduciary capacity, whether or not the conservator or guardian is individually liable therefor.

(d) Any question of liability between the estate and the conservator or guardian individually may be determined in an accounting, surcharge, indemnification or other appropriate proceeding or action.